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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY KH TIEU,

Defendant and Appellant.

C065662

(Super. Ct. No.
CM030027)

In the course of a number of arguments between defendant Henry Kh Tieu and his wife Jenny, defendant made numerous violent threats to Jenny and her family members. As a result, he was convicted of multiple counts of making criminal threats and personally using a firearm in committing those offenses. He appeals one of the criminal threat convictions and the attendant firearm-use enhancement, contending neither is supported by substantial evidence. He also appeals the amount of the restitution fund fine, arguing counsel was ineffective for failing to argue he lacked the ability to pay that fine. We find substantial evidence supports the convictions and the

firearm-use enhancement. We further find there was no prejudice in counsel's failure to raise the issue of defendant's ability to pay the restitution fund fine and therefore counsel was not ineffective. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

Jenny, her sister Wendy, and her father Xitang Wu (Wu) owned and operated two restaurants in Chico, Yummy Yummy's and Windy's Chinese. In August 2006 Jenny and her husband, defendant, were arguing at one of the restaurants.¹ Defendant claimed he had overheard a conversation between Wendy and Wu suggesting that Wu owed over \$10,000 in taxes and the sisters had been using money from the restaurant to help their father. Defendant confronted Jenny about the missing money. During the argument, defendant chased Jenny outside the restaurant and told her he wanted to "beat [her] up." When he failed to catch her, he warned her that if she did not come back and "face the issue of him," he would hurt her father, Wu. Jenny returned to the restaurant and walked up to defendant. He grabbed her hair and placed a gun to her forehead. Jenny was scared and frightened and afraid defendant might kill her.

Wu came out of the kitchen, saw defendant holding the gun on Jenny, and asked, "What are you doing?" Defendant told Wu to "shut up, you don't have the right to talk," slapped him across the face, and pointed the gun at Wu's head. When he pointed the

¹ Defendant testified this argument took place in April 2006.

gun at Wu's head and said, "Don't move . . . [i]f you move, I just kill you dead," Wu was very frightened and shaken. Eventually, defendant left the restaurant. Wu stopped working at the restaurant and did not return until 2008.

Over the course of the next year, defendant, Jenny, and Wendy continued to work at the restaurants. Eventually, Yummy Yummy's was closed.

By November 2008 Wu returned to work with Wendy and Jenny at Windy's Chinese. Jenny and her family wanted to discuss the restaurant's finances and debt level with defendant, but the discussion devolved into an argument. Defendant believed he was one of the restaurant owners and yelled at Wu that Wu had no right to interfere; the matter was between Jenny and himself. Wu responded that he owned the restaurant and his daughters managed it. Jenny's mother and Wendy joined the discussion, and defendant threatened to kill them if they did not leave. The family left and Jenny followed. Defendant followed Jenny.

Jenny and defendant continued to argue. Wendy called 911. While Wendy was on the telephone, defendant told Jenny they were making it hard for him and they would have to pay for this. He also threatened that if Wendy did not get off the phone, they were going to reach the point of no return. Jenny begged Wendy not to call the police because defendant would hurt them. Before police arrived, defendant threatened to kill the entire family. He repeated that threat upon being arrested. He told them they would pay when he was out of custody, again threatening to kill the whole family.

PROCEDURAL HISTORY

Based on the November 2008 argument, defendant was charged with dissuading a witness (Pen. Code, § 136.1, subd. (c)(1) -- count one),² making criminal threats to Wu (§ 422 -- count two), possession of an assault weapon (§ 12280, subd. (b) -- count three), and misdemeanor possession of a firearm with identification numbers removed (§ 12094 -- count four). As a result of the August 2006 argument, defendant was charged with making criminal threats to both Jenny and Wu. (§ 422 -- counts five and six, respectively.) It was also alleged as to counts five and six that defendant was personally armed during the commission of those offenses. (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a).)

Following a court trial, the court found defendant guilty of counts one, two, five, and six and not guilty of counts three and four. The personal use of a firearm enhancements were also found true. Defendant was sentenced to an aggregate term of 11 years eight months in state prison. Various fines and fees were imposed, including a restitution fund fine of \$8,800.

DISCUSSION

I

Defendant's first contention is that there was insufficient evidence to support his conviction of count five, making criminal threats to Jenny in violation of section 422. He

² Undesignated statutory references are to the Penal Code.

asserts the prosecutor elected to base the criminal threats charge on the incident when he "pointed a handgun at Jenny." He contends this act does not violate section 422, because "based solely on this incident" defendant's conduct was merely physical conduct; there was no verbal, written, or electronic statement. We disagree with defendant's interpretation of the record. Defendant also argues that because section 422 is not a continuing course of conduct crime, we must consider each act within the August 2006 incident separately and independently. We disagree with defendant's efforts to parse the criminal threat offense into incremental parts. By its terms, section 422 requires the communication be considered both "on its face and under the circumstances in which it is made."

"In reviewing a claim of insufficient evidence, we review the record in its entirety, considering the evidence most favorably to the prevailing party, and determine whether any rational trier of fact could have found the prosecution proved its case beyond a reasonable doubt." (*People v. Zavala* (2005) 130 Cal.App.4th 758, 766.) In making this assessment, we draw all reasonable inferences from the record in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not weigh the evidence or decide the credibility of the witnesses. (*Ibid.*)

"[T]o prove the offense of making criminal threats under section 422[,] [t]he prosecution must prove '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,"

(2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.'" (*In re George T.* (2004) 33 Cal.4th 620, 630.)

Defendant is correct, as the People concede, that a purely physical act would not support a section 422 conviction. We disagree, however, with defendant's reading of the record.

In his closing argument, the prosecutor clarified that to violate section 422, a verbal statement was required. "So the verbal statement immediately before putting the gun to her head was if she [Jenny] doesn't come back, he will hit your father -- -- hit your father. And at that point, she came back, and he put the gun to her head. [¶] It's our position that those statements in -- coupled with the threatening act of pointing the gun at her was sufficient for the 422." We do not read this as the People's electing to base count five on defendant's act of pointing the gun at Jenny's head. Rather, the prosecutor

clearly identified defendant's verbal statements immediately preceding that act, the demand that Jenny come back and finish their argument, as the operative verbal statement.

The fight between defendant and Jenny involved defendant's allegations that tens of thousands of dollars had been taken from the restaurant and given to Jenny's father, resulting in significant debt for the restaurant. During the fight, defendant chased Jenny out of the restaurant. When he could not catch her, he demanded she come back and face the issue with him, that is, finish the argument, or he would hurt her father. Shortly after making that threat, defendant pointed a gun at Jenny's head, slapped Wu across the face, told him to shut up, and pointed a gun at Wu's head. The prosecutor's reference to pointing the gun at Jenny's head was not an election of that as the act supporting the criminal threat conviction; rather, it was to give context to defendant's words, context which was critical in assessing the threat made.

In a footnote, defendant also contends that if we find the threat supporting the criminal threat conviction was the statement that he would hurt Jenny's father, there is still insufficient evidence to support the conviction because a threat to "hurt" Jenny's father does not satisfy the requirement that the threat "will result in death or great bodily injury to another person." Again, we disagree.

Section 422 makes clear that "the communication and the surrounding circumstances are to be considered together. . . . '[I]t is the circumstances under which the threat is made that

give meaning to the actual words used. . . .' (*People v. Butler* (2000) 85 Cal.App.4th 745, 753 . . . ; [citation].)" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860.) The relevant surrounding circumstances include the defendant's close proximity to the victim, expressed anger, or use of curse words. (See *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221.) In addition, the trier of fact may consider "a later action taken by a defendant in evaluating whether the crime of making a terrorist threat has been committed." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013-1014 (*Solis*) [later fire at apartment of victim clarified vague or ambiguous language of initial threat left on her answering machine]; *Martinez, supra*, 53 Cal.App.4th at p. 1221 [several arson fires properly used to evaluate conditional nature of threat against victim the day before]; and *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1341-1343 [threat sufficiently immediate when members of defendant's gang parked outside victim's house less than 30 minutes after threats were made].) "Defendant's activities after the threat give meaning to the words and imply that he meant serious business when he made the threat." (*Martinez*, at p. 1221, fn. omitted.)

Here, Jenny and defendant were arguing, in part, about her father. Defendant chased her and told her he wanted to beat her up. He warned her that if she did not come back and finish their argument, he would hurt Wu. After he grabbed Jenny and held a gun to her forehead, defendant slapped Wu, pointed the gun at his face, and threatened to kill him. Defendant was

angry, Jenny and Wu were in close proximity to him, and he held them both at gunpoint while issuing threats. Defendant's conduct after making the threat to "hurt" Wu gave meaning to his words and made clear it was a threat that would result in death or great bodily injury to Jenny's father. Accordingly, there was sufficient evidence to support the criminal threats conviction in count five.

II

Defendant next contends there was insufficient evidence to support the firearm-use enhancement under section 12022.5, subdivision (a). He contends the threat was complete when Jenny returned to the restaurant and before he pulled the gun, because at that point she had complied with his demand. Accordingly, defendant contends he did not use the firearm in the commission or furtherance of any felony. Again, we find defendant reads the record too finely and we disagree.

"[A] firearm-use allegation may be established as true if the defendant 'utilized the gun at least as an aid in completing an essential element of the [underlying] crime.' [Citation.]" (*In re Tameka C.* (2000) 22 Cal.4th 190, 197 (*Tameka C.*)). An essential element of the offense of criminal threats is that "the threat causes the listener to suffer sustained fear based upon a reasonable belief the threat would be carried out." (*Solis, supra*, 90 Cal.App.4th at p. 1024.) "Sustained fear" means fear that continues for "'a period of time that extends beyond what is momentary, fleeting, or transitory.'" (*Id.* at p. 1024.) Thus, in determining whether a threat caused a victim

to suffer sustained fear, a trier of fact may properly consider an action the defendant took after the threat. (*Id.* at p. 1014.) This is so because a victim might not take a threat seriously until presented with further conduct by the defendant. Accordingly, "the threatening statement does not have to be the sole cause of the victim's fear . . . a statement the victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant." (*Ibid.*)

Contrary to defendant's claim, his "warning" to Jenny was not "completed, because Jenny complied fully with [defendant's] demand" by going back into the restaurant. Defendant's threat to Jenny demanded she come back *and finish the argument* with him. The argument was plainly not over when they returned to the restaurant. It was not only defendant's threat to Jenny, but his subsequent actions of pointing the gun at her head and at her father that caused the threat to make Jenny experience sustained fear. Because he utilized the gun to aid in completing an essential element of the crime of making a criminal threat, defendant used the firearm in the commission of the criminal threat. (*Tameka C., supra*, 22 Cal.4th at p. 197.) Accordingly, there was substantial evidence to support the firearm-use enhancement under section 12022.5, subdivision (a).

III

Defendant next contends defense counsel was ineffective in failing to object to the \$8,800 restitution fund fine (§ 1202.4)

as excessive based on defendant's inability to pay.³ We are not persuaded.

Defendant sustained four felony convictions and was sentenced to a term of 11 years eight months in state prison. The probation report indicates defendant had no cash savings, no property, no assets, no income, and no debt. Defendant's job skills included restaurant, machine shop, and heating and air conditioning work. The United States Immigration and Customs Enforcement Department placed defendant on an immigration hold. At the conclusion of his sentence, defendant will be taken into custody and deportation proceedings commenced. Based on defendant's sentence, the probation report recommended imposition of a restitution fund fine of \$8,800 in accordance with the formula suggested in section 1202.4, subdivision (b)(1).

""[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that,

³ Defendant's heading on this issue indicates he is arguing both that the trial court erred and that counsel was ineffective in failing to raise the issue. However, as defendant does not actually argue the trial court erred, we need not consider that claim.

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]" (People v. Avena (1996) 13 Cal.4th 394, 418, fn. omitted.) We need not determine whether counsel's performance was deficient because we can dispose of defendant's ineffectiveness claim on the ground of lack of prejudice. (Strickland v. Washington (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674, 699].)

Defendant contends the error here was prejudicial as the court ultimately found he did not have an ability to pay public defender fees. Based on this determination, defendant posits "there is a reasonable probability that the trial court would have similarly granted . . . counsel's . . . request for a lower restitution fine" had counsel objected to the \$8,800 recommendation in the probation report. We disagree.

"In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.' (§ 1202.4, subd. (b).)" (People v. DeFrance (2008) 167 Cal.App.4th 486, 505 (DeFrance).) The court may set the fine as the product of the minimum fine, here \$200 (§ 1202.4, subd. (b)(1)), "multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted" (§ 1202.4, subd. (b)(2)). "[I]n imposing a restitution fine, the trial court must consider

a defendant's ability to pay." (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1485 (*Frye*).)

Defendant's claim of ineffective assistance of counsel necessarily assumes the trial court did not properly consider defendant's ability to pay the restitution fund fine. But, we presume the trial court considered ability to pay. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) Defendant does not "identify anything in the record indicating the trial court breached its duty to consider his ability to pay; as the trial court was not obligated to make express findings concerning his ability to pay, the absence of any findings does not demonstrate it failed to consider this factor." (*Ibid.*) Nor has defendant suggested there is any additional information that was not considered by the court. Rather, the information defendant now relies on to assert his claim was before the trial court at the time it imposed the restitution fund fine. The court set the fine in accordance with the formula described in section 1202.4, subdivision (b)(1). Since the court presumably considered the relevant information and defendant's ability to pay, we cannot find any prejudice in counsel's failure to raise the issue.

Moreover, the statutes governing the determination of the restitution fund fine and reimbursement of public defender fees are entirely distinct. They allow consideration of different factors in determining ability to pay and operate under different presumptions.

In the context of reimbursing defense costs, "ability to pay" requires "consideration of the defendant's financial

position at the time of the hearing, his or her 'reasonably discernible' financial position over the subsequent six months, including the likelihood of employment during that time, and '[a]ny other factor or factors which may bear upon the defendant's financial capability to reimburse the county.' (§ 987.8, subds. (g)(2)(A)-(D).)" (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1205-1206.) These considerations must include defendant's likely income and assets. (*Ibid.*) Absent a finding of unusual circumstances, "a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B).) Here, defendant was sentenced to state prison for 11 years eight months. Absent a finding of unusual circumstances, he was presumptively unable to reimburse defense attorney fees.

By contrast, in determining whether a defendant has the ability to pay a restitution fund fine, "the court is not limited to considering a defendant's *present* ability but may consider a defendant's ability to pay in the future." (*Frye, supra*, 21 Cal.App.4th at p. 1487.) The determination under this statute "does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) In fact, unless there are compelling and extraordinary reasons, the defendant's lack of assets and limited employment potential are not germane to his or her ability to pay the fine. (*People v. McGhee* (1988) 197 Cal.App.3d 710, 715; see § 1202.4, subd. (c).) Prison wages may be considered in determining

ability to pay restitution fund fines, and the statute presumes that "a defendant has the ability to pay the fine." (*DeFrance, supra*, 167 Cal.App.4th at p. 505.) "Thus, a defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have the 'ability to pay' a restitution fine." (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) Accordingly, the trial court's determination that defendant did not have an ability to pay defense attorney fees does not suggest that a similar finding would have been made relative to the restitution fund fine. Given the governing presumptions, we find no prejudice and cannot find counsel was ineffective in failing to raise the issue of defendant's ability to pay the restitution fund fine.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BUTZ, J.

HOCH, J.